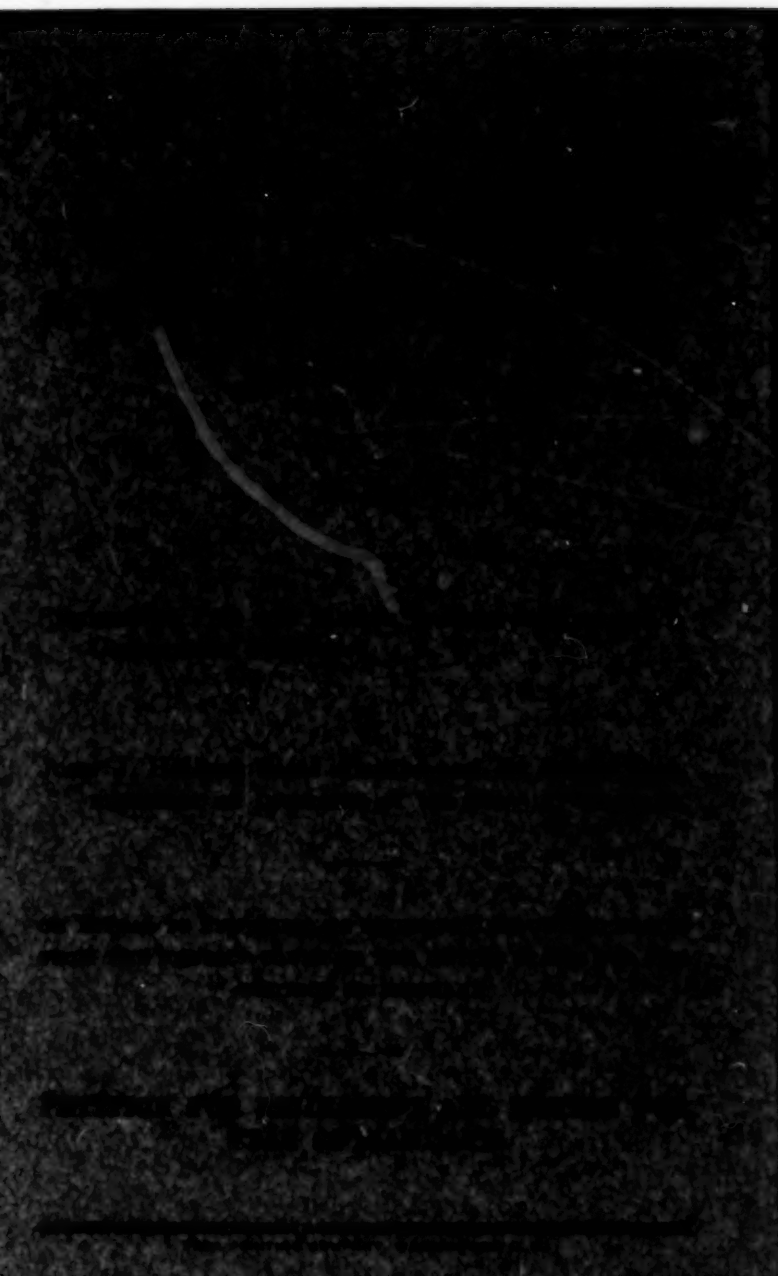

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 156

SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, a Corporation, *Petitioner*,

v.

JOHN J. HOLMES, State Auditor and Ex Officio Commissioner of Insurance of the State of Montana.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

PETITION FOR REHEARING AND MOTION FOR STAY OF MANDATE

The petitioner herein, Springfield Fire and Marine Insurance Company, respectfully prays for a rehearing of this case.

In this case a District Court composed of three Federal Judges held Chapter 95 of the Laws of Montana, 1937, unconstitutional under the Fourteenth Amendment to the Constitution of the United States. The defendant, Commissioner of Insurance, appealed to the Supreme Court of the United States and the Supreme Court of the United States on October 14, 1940, by per curiam decision reversed the judgment on the authority of *Osborn* v. *Ozlin*, 310 U. S. 53.

It is respectfully submitted that the judgment should have been sustained on the authority of *Fidelity and Deposit Company of Maryland* v. *Tafoya*, 270 U. S. 426, 70 L. Ed. 664, for the following reasons:

1. Chapter 95, Laws of Montana, 1937, is a law requiring, among other things, that all contracts of insurance upon risks within the State of Montana shall be countersigned by a resident agent. No objection is made to that provision. However, the law further requires that said resident agent • • •

> *shall receive the full commission on all such policies, bonds or contracts of insurance or indemnity, when the premium is paid* • • • *and that said resident agent or agents shall receive the full commission on all policies when premium is paid.*

As appears in the Order to Show Cause issued by the Insurance Commissioner September 7, 1938, paragraph IV, the Attorney General of Montana rendered an opinion that the words "full commission" conveyed the intent

> "that the resident Montana agent should receive the same commission for counter-signing an insurance contract as he would receive from the same business if he secured it himself."

As appears from said Order to Show Cause, paragraph V, the Attorney General on November 30, 1937, held that the law

> "prohibits a resident Montana agent from rebating or sharing the commission paid on any issued contract of insurance with an out of state agent forwarding the contract of insurance into the State of Montana for counter-signature."

As appears in the stipulated facts the full commission on the policy of insurance in question would have been fifteen per cent of the premium if the resident agent had solicited and secured the business (Stipulated Fact No. VI).

As appears in the stipulated facts five per cent of the premium, or one-third of the commission was allocated to the resident agent and ten per cent of the premium or two-thirds of the commission to the non-resident agent (Stipulated Fact No. V).

The Insurance Commissioner in the Order to Show Cause threatened to cancel the charter of the Springfield Fire and Marine Insurance Company and to impose the other penalties in the law unless the resident agent should be paid the full fifteen per cent of the premium which was the full commission. *This amounts to a refusal to permit payment of any part of the established commission to the non-resident agent,* which is in effect contrary to the decision in *Fidelity and Deposit Company of Maryland* v. *Tafoya,* 270 U. S. 426.

For this reason the District Court in reliance upon the decision in *Fidelity and Deposit Company of Maryland* v. *Tafoya,* 270 U. S. 426, 70 L. Ed. 668, held that the Montana statute as construed by the Attorney

General of the State of Montana goes beyond any legitimate interest of the state in that, as so construed, it excludes a foreign corporation from doing business within its borders.

Actually in this case this statute, as construed by the Attorney General of Montana, as appears in the Order to Show Cause makes it unlawful for any insurance company authorized to do business in Montana to pay any part of the commission to any agent outside of the State of Montana for the obtaining, placing or writing policies covering risks in Montana.

Citing the Tafoya case, the District Court in Montana refused to sustain the validity of the Statute as so construed:

> "'It is suggested that the District Court had no jurisdiction because the bill does not allege that the statute is unconstitutional *but only that the statute as construed by and applied by the defendants is so.* But even if the statute did not plainly purport to justify and require the threatened action, or if the bill fairly taken did not import a denial of the constitutionality of the law *as applied in this case,* the defendant still would be entitled to come into a court of the United States to prevent such an alleged violation of its constitutional rights.' (Emphasis supplied)"

2. It is respectfully submitted that *Osborn* v. *Ozlin,* 310 U. S. 53, is not authority upon which to uphold the validity of such extreme regulation. On the contrary, in *Osborn* v. *Ozlin* the court approved the decision in *Fidelity and Deposit Company of Maryland* v. *Tafoya* and held that the New Mexico statute went beyond any legitimate interest of the state:

> "The court found that New Mexico had exceeded

> its power by forbidding 'the payment of any emolument of any nature to any (non-resident) for the obtaining, placing or writing of any policy covering risks in New Mexico.' The court was of the opinion that this statute went 'beyond any legitimate interest of the state.'"

The Virginia statute in question in *Osborn* v. *Ozlin* was a statute providing that no contracts of insurance should be written in Virginia "except through regularly constituted and registered agents or agencies of such companies." The statute further provided that said agent "shall be entitled to and shall receive the usual and customary commissions allowed on such contracts any may not share more than half of the commission with a non-resident broker."

Obviously there would be no serious objection to a law requiring the payment of a *usual* and *customary* commission to a resident agent, and the state might even require the resident agent to retain some part of the commission without infringing upon contracts outside of the state. The Virginia statute is therefore different from the Monana statute in that the Montana statute, as construed by the Attorney General, requires payment of the full commission to a resident agent and in effect prohibits payment of *any* commission to the non-resident agent.

If the Montana statute as construed by the Attorney General is sustained and if, as a result thereof, the injunction heretofore issued is dismissed, the Springfield Fire and Marine Insurance Company will have suffered the penalties under the law, not because the law attempts to fix a reasonable or customary commission within the state of Montana but because the law, as construed, prohibits the payment of any commission

to a non-resident agent, all of which is inconsistent with the decision in the Tafoya case.

It is most respectfully submitted that since the decision in *Osborn* v. *Ozlin* approves the decision in *Fidelity and Deposit Company of Maryland* v. *Tafoya* and since the case at bar falls within the rule of the latter case there must be continued uncertainty and confusion in respect to the power of state legislatures to regulate resident agents' commissions until these decisions are reconciled.

It is therefore respectfully submitted that a rehearing should be granted and that the extent to which the state may go, either directly or indirectly, in prohibiting payment of commissions to non-resident agents should be settled.

As the mandate of this Court will issue under Rule 34 on Friday, November 8, 1940, it is respectfully moved that the issuance of such mandate be stayed until final decision of the case.

BRICE TOOLE,
HOWARD TOOLE.

We hereby certify that this petition is presented in good faith and not for delay.

BRICE TOOLE,
HOWARD TOOLE.